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Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

October Term, 1986

GEORGE T. ACRI, *et al.*,

Petitioners,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT LODGE 115 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND LOCAL LODGE 68 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is any remedy available to union members when their union breaches its duty of fair representation by intentionally misrepresenting the terms of a proposed collective bargaining agreement in order to secure their approval of the agreement?

2. Must union members who have given up their strike and approved a proposed collective bargaining agreement in reliance upon their union officials' intentional misrepresentations concerning the contents of that agreement establish that their employer would have made additional concessions if the misrepresentations had not been made and the strike had continued in order to obtain a remedy for breach of the union's duty of fair representation?

PARTIES

Petitioners are GEORGE T. ACRI, GARY R. ALTHEN, JOSE ANGULO, JOHN R. ARMSTRONG, MORRIS N. ARONOVSKY, CHARLES ATTARD, NORBERT H. BAUMBART, GLENN E. BERG, WALDO M. BOST, JOSEPH R. BOLTES, DONALD T. BRAUND, ROBERT W. BUCHMANN, JOHN CAPETANOS, GARY E. CHAMPAGNE, GERALD R. COLLINS, JAMES R. COFONE, JOHN W. DAMON, GUNTHER A. DERTZ, BRUNO A. DI PIETRO, RALPH B. DRAPER, PETER K. FANTA, ANDREW J. FLICK, WILLIAM M. FOSTER, RICHARD FROEHLICH, MAX R. FRYDMAN, JAMES F. GALVIN, ARMANDO J. GARAVENTA, ANTON GEIER, EDWARD B. GELACK, JAMES P. GIGLIOTTI, VASCO GIUSTI, THOMAS B. GONZALES, RENE GUZMAN, EDWARD K. HALL, RICHARD E. HANSEN, ANDREW P. HAXTON, EVERETT HEICK, ANTHONY B. HIERZIG, HERBERT HUFNAGL, KENNETH F. HUNTINGTON, HENRY A. INFUSINO, ASHFORD JONES, ROBERT KESSLER, ANTHONY LA STELLA, ROBERT R. LAYMAN, LEO LEBEDEFF, LASZLO LENGYEL, JOHN G. LETTERMAN, MARTTI J. LUMME, WINFIELD J. LONG, RICHARD P. LUCERO, JANOS MAGLODI, LEO MANUS, JOSEPH E. MARSHALL, ROBERT A. MIGUEL, VERNON F. MILLER, LARRY P. MITCHELL, RONNIE S. MITCHELL, FRANK MONTELEONE, HAROLD E. MOORE, JULIUS MORICZ, ELMER OLSEN, JOSEPH PASSANISI, RUDOLFO E. PI, CARLO POZZATO, CARLOS QUEZADA, LARRY S. RAFFERTY, LAMBER B. RAX, DARRELL G. REED, JOSE J. RENDON, GUNTHER H.

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Respondents are INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT LODGE 115 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND LOCAL LODGE 68 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners George T. Acri, *et al.* (hereinafter collectively referred to as "Acri"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet officially published and which is unofficially published at 121 BNA LRRM 2679, is attached hereto as Exhibit A. The Memorandum Opinion of the District Court granting Respondents' motion for summary judgment is attached hereto as Exhibit B and is reported officially at 595 F. Supp. 326 and unofficially at 118 BNA LRRM 2112.

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JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1986. This petition is timely filed pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

———o———

STATUTORY PROVISION INVOLVED

Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185) provides in relevant part as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties."

———o———

STATEMENT OF THE CASE

A. The Facts

Petitioner George T. Acri was a member of the International Association of Machinists and Aerospace Workers and its affiliated District Lodge 115 and Local Lodge 68 (hereinafter collectively referred to as "IAM") employed at the American Can Company in Brisbane, California. From 1974 to 1977, the collective bargaining agreement between American Can and IAM provided that severance payments in the event of a plant closure would be paid from a designated fund and that such benefits were guaranteed only to the extent of the monies in that fund.

Following the expiration of that agreement, the IAM struck. Severance pay was a key issue in the strike in light of rumors of an impending plant closure. At a union meeting held on June 17, 1977, to consider a proposed new contract, IAM officials advised Acri that American Can had agreed to remove the limitation on the payment of severance benefits. It appears that these officials knew that these representations were false at the time they made them. In reliance upon these assurances, the affected members ratified the proposed contract and ended their strike.

When the new contract was printed, no change in the severance benefit language was included. In February 1980, American Can announced that it was going to close its plant, and Acri learned that there was not enough money in the fund to pay full severance benefits. The IAM continued to maintain that American Can had agreed

to remove the limitation on its obligation to pay severance benefits and took the issue to arbitration.

On October 14, 1981, the arbitrator ruled that American Can had never agreed to guarantee the payment of severance benefits beyond the sums contained in the special fund. He divided the available funds among the eligible members at a rate of approximately fifty percent of the amount to which they would have been entitled absent the limit. The members who filed this action in the district court received an aggregate amount of approximately $450,000.00 less than they would have received had the limitation been removed.

B. Proceedings Below

Petitioners first filed their action in the District Court on August 6, 1980. The parties stipulated to a dismissal of the case without prejudice. pending the arbitrator's decision. The present action was filed on January 14, 1982, three months after the rendition of the arbitrator's award.

Acri alleged that the IAM breached its duty of fair representation by intentionally misrepresenting the terms of the proposed collective bargaining agreement. The jurisdiction of the District Court was invoked pursuant to 29 U.S.C. § 185, and 28 U.S.C. §§ 1337, 2201, and 2202.

Following extensive discovery, IAM moved for summary judgment. Acri presented evidence indicating that the proposed contract would not have been ratified but for the IAM's misrepresentations, but conceded that he could not prove that American Can would have agreed to remove the limitation on its obligation to pay severance benefits had the strike continued. Based upon these facts the District Court concluded that Acri's inability to make such a

showing required a grant of summary judgment. The District Court further ruled that the doctrine of promissory estoppel could not be applied in duty of fair representation cases. (The court also found that the action had been timely filed and granted summary judgment as to 12 of the plaintiffs for reasons unrelated to the subsequent appeal or this petition.) (Appendix B)

Cross-appeals were filed. On February 6, 1986, the Ninth Circuit upheld the decision of the District Court.

Disagreeing with the District Court, the Court of Appeals reasoned that conduct such as that alleged by Acri does constitute a breach of the union's duty of fair representation, citing *Bloom v. Teamsters Local 468,* 752 F.2d 1312, 1313-1314 (9th Cir. 1984); *Anderson v. United Paperworkers International Union,* 641 F.2d 574, 576-578 (8th Cir. 1981); and *Deboles v. Trans World Airlines,* 552 F.2d 1005, 1018 (3rd Cir. 1977), *cert. denied* (1977) 434 U.S. 837. The Court concluded, however, that Acri could recover no damages unless he could prove "that (1) the vote to ratify would have been different had the misrepresentations not been made; and (2) that the company would have acceded to union demands had the vote been different." (App. 8.)

The Ninth Circuit also disagreed with the District Court in finding the doctrine of estoppel applicable to this case, but ruled that its application would be of no avail because Acri could not show that "reliance on the alleged misrepresentations was to their detriment." (App. 8.) The Court rejected Acri's contention that his inability to establish what would have occurred had the strike continued is a consequence of the IAM's misrepresentations,

and that the IAM should therefore not be allowed to rely on its misconduct to escape all liability in this matter.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is In Fundamental Conflict With This Court's Decisions Requiring The Award Of Appropriate Remedies In Fair Representation Cases.

The Ninth Circuit concluded that Acri could establish a breach of the duty of fair representation by showing that his union officials had intentionally misled him about the contents of a proposed collective bargaining agreement in order to secure his approval for it. (App. 7.) *Bloom, supra; Anderson, supra; Deboles, supra.* But at the same time, the court concluded that Acri could recover no remedy for this breach unless he could show both that the proposed contract would have been rejected had the misrepresentations not been made and that rejection of the contract would have led to further employer concessions. (App. 7-8.) The concurring opinion of Circuit Judge Reinhardt demonstrates that the Ninth Circuit's ruling makes the availability of a fair representation action illusory in cases of this sort:

> . . . I write separately to point out that the rule we follow has the practical effect, in almost every instance, of precluding union members from recovering against their unions in cases of this kind. We hold here, as courts have previously held, that a union member can establish liability only if he can show that had the strikes continued, the employer would have

> acceded to the union's requests. *This is a fact that is ordinarily simply not susceptible of objective proof.* (Emphasis added.) (App. 12.)

Clearly, a rule which creates an impossible burden for union members who have established intentional misrepresentations on the part of their union officials is contrary to this Court's rulings in fair representation cases.

In *Steele v. Louisville and Nashville Railway Co.*, 323 U.S. 192 (1944), a case challenging a union's action in negotiating and implementing a racially discriminatory employment contract, the Court established the fair representation doctrine, requiring unions to represent their members "without hostile discrimination, fairly, impartially, and in good faith." 323 U.S. at 204. The Court reasoned, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those who it represents, (citation omitted), but it also imposed on the representative a corresponding duty." 323 U.S. at 202. The Court stated that when the duty is breached, the "usual judicial remedies of injunction and award of damages" are available. 323 U.S. at 207.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court extended the fair representation duty, requiring unions to process member grievances against their employers free from conduct which is "arbitrary, discriminatory, or in bad faith." 386 U.S. at 189. The Court noted that the fair representation doctrine serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 386 U.S. at 182. To effectuate the purposes of this doctrine, the Court determined that dam-

ages should be awarded as necessary to ensure full compensation. 386 U.S. at 196.

The parameters of damage awards against unions were specifically addressed by the Court in two subsequent cases. In *Electrical Workers v. Foust,* 442 U.S. 42 (1979), the Court ruled that punitive damages could not be awarded in fair representation cases, concluding that to allow such awards might compromise the financial stability of unions and thus undermine the process of collective bargaining. The Court reasoned, "Our function, therefore, is to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching goal is to facilitate collective bargaining and to achieve industrial peace." 442 U.S. at 47. Further, it noted that "The fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights." 442 U.S. at 48-49. In reaching its conclusion, the Court struck a balance, noting that its decisions reflect "an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds." 442 U.S. at 50.

The Court applied this principle to ensure greater union accountability in *Bowen v. U.S. Postal Service,* 459 U.S. 212 (1983), approving a policy of apportioning damages between the employer and the union when the union's breach of its duty increases the damages suffered by an employee improperly terminated. The Court concluded, "Nor will requiring the union to pay damages impose a burden on the union inconsistent with national labor policy." 459 U.S. at 227.

These cases establish several principles against which the decision of the court below should be measured. *Steele* and *Vaca* both stand for the proposition that persons whose rights are violated in the fair representation context should be afforded the full panoply of legal and equitable remedies. *Vaca* also establishes a policy requiring that remedies be provided "to prevent arbitrary union conduct." While *Foust* cautions that remedies must be limited to prevent application of the fair representation doctrine from undermining the structure of national labor relations, *Bowen* balances this consideration in holding that substantial damages awards may sometimes be required to protect individual rights.

In contradiction to these principles, the decision of the Ninth Circuit serves to immunize conduct which is far more harmful to the structure of labor relations than that frequently challenged in fair representation cases. In *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), the Court concluded that liability could be predicated upon the union's "arbitrary" conduct in failing to interview a witness who could provide exculpatory testimony at a grievance hearing. 424 U.S. at 571-572. In *Bowen, supra,* the conduct which gave rise to the union's liability was its failure to file a timely grievance. 442 U.S. at 43. In the instant case, the Ninth Circuit's decision assumes that the union officials involved intentionally lied to their members about the contents of a proposed collective bargaining agreement and that the members would have rejected that agreement had the truth been told. (App. 8-9.) But the court denied these members any remedy because they admitted that they could not establish what would have occurred had the union officials not lied, had the

proposed contract been rejected, and had they continued their strike. As the concurring opinion so clearly demonstrates, the decision of the Ninth Circuit creates an impossible burden for union members such as those in the instant case and renders the fair representation remedy illusory. (App. 13-14.) This result continues a trend recently noted and documented by one commentator. "In light of these findings, this Article evaluates the charge, often made by plaintiffs' lawyers, that the duty of fair representation is little more than an empty promise which ultimately fails to provide workers with meaningful protection from arbitrary, discriminatory, or perfunctory union conduct." Goldberg, "The Duty of Fair Representation: What the Courts Do In Fact," 34 *Buffalo Law Review* (1985), p. 96. The conclusion drawn by Professor Goldberg is that the charge has more than a little merit. *Id.* at 157-159.

B. The Decision Below Creates An Unjustified Exception To The Principle That A Wrongdoer Who Has Made It Impossible For An Injured Party To Quantify His Damages With Certainty Should Not Thereby Be Allowed To Avoid All Liability For His Misconduct.

It has been long established that, "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts . . . The wrongdoer is not entitled to complain that they cannot be measured with the exactness and the precision that would be possible if the case which he alone is responsible for mak-

ing, were otherwise." *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563 (1930). This principle applies well to the instant case. The union's actions have made it impossible for Acri to establish what would have occurred had the misrepresentations not been made. Yet the decision below effectively rewards the union for its dishonesty by holding that Acri can recover no remedy because that dishonesty prevented him from determining what would have occurred if the misrepresentations had not been made.

The Ninth Circuit is correct in concluding that Acri has no way of showing that he would have won from his employer the severance benefits promised by the union had the strike continued. (App. 9-10.) However, it does not follow from this conclusion that he has not been injured at all. (App. 10.)

Rather, Acri has been deprived of the right to be free from arbitrary, discriminatory, or bad faith union conduct, a conclusion implicitly recognized by the decision below. (App. 7.) Furthermore, the union's misrepresentations deprived Acri of the right to determine, based on accurate information, whether to continue his strike against his employer. Granted, these are intangible rights, but they are nonetheless important rights based upon the fundamental principles of American labor relations policy. Because Acri cannot with accuracy place any particular dollar value on the loss of these rights, he has been denied all remedies.

However, our system of law recognizes that "[t]he injured party is not to be barred from a fair recovery by impossible requirements. The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for nonexistent certainty." *Palmer v.*

Connecticut Railway & Lighting Co., 311 U.S. 544, 560-561 (1941).

It is well established at common law that in cases involving "dignitary torts" or invasions of intangible interests, damage is presumed. *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919). See also *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927). The wrong may be said to constitute damage in and of itself (*Sutherland v. Kroger Co.*, 144 W.Va. 673, 110 S.E.2d 716 [1959]). See D. Dobbs, Law of Remedies § 7.3, pp. 528-531 (1973).

In these cases the major purpose of the suit may be to obtain a public declaration that the plaintiff was improperly treated, and general damages serve the purpose of vindicating the injured party. See Restatement (Second) of Torts, § 901, at 453 (1977). In *Carey v. Piphus*, 435 U.S. 247 (1977), the Court held that persons deprived of procedural due process should be allowed to recover nominal damages without proof of actual injury. In reaching this conclusion the Court noted that the right to procedural due process is "absolute," and that the importance to our society that procedural due process be observed required a remedy for its violation without regard to the substantive merits of the underlying dispute. 435 U.S. at 266-267.

The same may be said about the importance to national labor policy of the duty of fair representation. The ability of labor unions to perform their roles in collective bargaining is seriously hampered by a rule of law which allows union officials to lie with impunity about the contents of proposed collective bargaining agreements. If union members cannot trust their officials to honestly represent to them the contents of a proposed agreement, they

will be less willing to authorize the execution of collective bargaining agreements or to end their strikes. Furthermore, unclarity about what has been agreed to in collective bargaining will create, as it did in this case, unnecessary disputes between union members and their employers.

Carey, however, does not require that only nominal damages be awarded in the instant case. In *Carey,* the Court specifically noted that cases awarding damages for deprivation of substantive constitutional rights were not there controlling. 435 U.S. at 264-265. In cases involving deprivation of substantive rights, substantial general damage awards have been upheld without proof of actual loss. See *Brandon v. Allen,* 719 F.2d 151, 154-155 (6th Cir. 1983) rev'd on other issues sub nom. *Brandon v. Holt,* — U.S. —, 105 S.Ct. 873 (1985) (unreasonable seizure in violation of the Fourth Amendment); *Walje v. City of Winchester,* 773 F.2d 729, (6th Cir. 1985) (termination of employment in violation of First Amendments rights to freedom of speech and association); *Foster v. MCI Telecommunications,* 773 F.2d 1116 (10th Cir. 1985) (discrimination and humiliation based upon race in violation of the Thirteenth Amendment).

In this case Acri has asserted that principles of equitable estoppel should establish the measure of his damages and that the IAM should be required to honor its commitment by paying him the difference between what it promised and what the employer really agreed to pay. The court below responded to this argument by again pointing out that Acri cannot establish that the employer would ever have agreed to pay the amounts promised by the union. (App. 10.) Acri concedes that point but insists

that his infirmity is the direct result of the union's conduct and should not bar him from recovery of any kind.

CONCLUSION

The decision below represents a serious diminution of the interests protected by this Court's decisions defining the duty of fair representation and establishing the parameters of the remedies available for its breach. At very minimum, Acri should have been allowed a judgment for nominal damages, declaratory relief, costs, and attorney's fees to vindicate his right to be free from intentional union misconduct. The effect of the decision below is to render the "bulwark" against arbitrary union conduct established by the Court in *Vaca, supra,* a sieve allowing intentional misconduct to flow through unimpeded. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATED: May 2, 1986

Respectfully submitted,

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FOR PUBLICATION

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Nos. 84-2467
84-2509

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Plaintiffs-Appellants,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS: DISTRICT LODGE 115 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS; and LOCAL LODGE 68 of the INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,

Defendants-Appellees.

Appeal from the United States District Court
of the Northern District of California
Eugene F. Lynch, District Judge, Presiding
Argued and submitted October 9, 1985
San Francisco, California

OPINION

(filed February 6, 1986)

Before: REINHARDT, BEEZER, and HALL, Circuit Judges.

HALL, Circuit Judge:

Plaintiffs-appellants, members of the International Association of Machinists District Lodge 115 ("plain-

tiffs''), appeal the district court's grant of summary judgment in favor of defendant-appellees International Association of Machinists, District Lodge 115 of the International Association of Machinists, and Local Lodge 68 of the International Association of Machinists (the ''Union''), and the district court's denial of their motion for leave to amend. We affirm.

BACKGROUND

From 1974 to 1977, the collective bargaining agreement (the ''1974-1977 agreement'') between the Union and the employer, American Can Company, provided for severance benefits to be paid from a particular fund. Under this provision the employer guaranteed severance pay only to the extent of the fund.

After the expiration of the 1974-1977 agreement, the Union struck. The limit on severance pay was an issue during the strike. At a union meeting on June 17, 1977, union representatives Bob Vegas and Stan Jensen allegedly told the union members present that American Can had agreed to remove the limit on severance pay. A new agreement was ratified at the meeting. There is no record of the breakdown of the ratification vote.

Plaintiffs became aware that the severance pay provision had not been revised in late 1977, when ''paste-in'' pages to the agreement were distributed and the severance pay provision in the agreement was unchanged. On February 1, 1980 American Can informed plaintiffs that it was going to close the plant as of April 30, 1980. Between February 1, 1980 and February 14, 1980 all plaintiffs were informed that there was not enough money in the fund to

pay the full amount of severance pay to which plaintiffs were entitled. The Union proceeded to arbitrate the issue of whether American Can had agreed to remove the limit from the severance pay provisions.

Plaintiffs filed their first complaint on August 6, 1980, while the arbitration was still pending. On December 15, 1980 the parties filed a stipulation dismissing the action and tolling the statute of limitations from August 6, 1980 until one year after the arbitrator's decision or August 6, 1983, whichever came first. On October 14, 1980 the arbitrator determined that American Can had not agreed to modify the severance pay provisions, and awarded severance pay to union members *pro rata* at approximately fifty percent of the amount which they would have been entitled to absent the limit.

Plaintiffs filed the current cause of action for breach of the duty of fair representation under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("§ 301"), on January 14, 1982. The district court granted the Union's motion for summary judgment after discovery was completed. After oral argument on the summary judgment motion, but before the district court granted the motion, plaintiffs sought leave to amend their complaint to add a cause of action under section 101(a)(1) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(1) ("§ 101"), and seek damages for emotional distress. The district court denied leave to amend, finding that amendment would be futile and would result in substantial prejudice to the Union because it would necessitate further discovery.

TIMELINESS OF PLAINTIFFS' CAUSE OF ACTION

The district court found that plaintiffs' cause of action did not accrue until the arbitrator rendered his decision, and therefore concluded that plaintiffs' action was timely even if the six-month statute of limitations applicable to unfair labor practices was applied to plaintiffs' duty of fair representation claim. The determination of which statute of limitations applies to a given cause of action is a question of law which we review *de novo*. *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036, 1039 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984). When, as in this case, the evidentiary facts determining the date of accrual are not in dispute, accrual is also a question of law. *Fleury v. Harper & Row Publishers*, 698 F.2d 1022, 1029 (9th Cir.) *cert. denied*, 104 S. Ct. 149 (1983).

Prior to the Supreme Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), we applied the statute of limitations applicable to statutory causes of action under state law in duty of fair representation cases. *See Edwards*, 719 F.2d at 1039-40. In *DelCostello* the Supreme Court held that duty of fair representation actions are governed by the six-month statute of limitations applicable to unfair labor practice cases. 462 U.S. at 163-172. We have given *DelCostello* retroactive effect only when the state statute of limitations was shorter than the six-month period provided by *DelCostello*. *Aragon v. Federated Department Stores*, 750 F.2d 1447, 1451 (9th Cir.), *cert. denied*, 106 S. Ct. 229 (1985). In this case, state law provides a three-year statute of limitations. Cal. Civ. Proc. Code § 338(1). Because this action was

filed before *DeCostello* was decided, and because state law provides a longer statute of limitations, the state statute determines the timeliness of plaintiffs' cause of action. *See McNaughton v. Dillingham Corp.*, 722 F.2d 1459, 1460-62 (9th Cir. 1984); *Edwards*, 719 F.2d at 1040-41.

"Although state law defines the length of the limitations period, federal law determines when the plaintiff's alleged cause of action accrued." *Archer v. Airline Pilots Association International*, 609 F.2d 934, 937 (9th Cir. 1979) (citing *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 754 (9th Cir. 1978)), *cert. denied*, 446 U.S. 953 (1980). Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action. *See Impro Products v. Block*, 722 F.2d 845, 850-51 (D.C. Cir. 1983), *cert. denied*, 105 S. Ct. 327 (1984); *Baron v. United Artists Pictures Corp.*, 717 F.2d 105, 108 (3d Cir. 1983). Applying this principle, we have held that a cause of action does not accrue at the time plaintiff becomes aware of a wrong if, at that time, the plaintiff's damages are not certain to occur or too speculative to be proven. *Archer*, 609 F.2d at 937-38 (duty of fair representation cause of action under the Railway Labor Act, 45 U.S.C. §§ 151-188, did not accrue until amount of contingent fee which plaintiff would be claiming as damages became certain). *See also In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72-73 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1361 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

Plaintiffs became aware of the alleged misrepresentations when the paste-in pages were distributed in late 1977. Plaintiffs had not suffered any injury at this time. The

injury occurred when the plant closed. Accordingly, plaintiffs cause of action did not accrue until sometime between February 1, 1980 and February 14, 1980, when plaintiffs were informed that the plant would be closed and that severance pay would be limited to the amount available in the fund. Plaintiffs' complaint filed on January 14, 1982 complies with the applicable three-year statute of limitations.[1]

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[1] In concluding that plaintiffs' cause of action did not accrue until the arbitrator rendered his decision, the district court applied the traditional approach to accrual in duty of fair representation cases under which a cause of action does not accrue until the union and the employer "resolve the grievance or terminate further consideration of it." *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983), *cert. denied*, 105 S.Ct. 291 (1984). But this is not an ordinary duty of fair representation case in which a union member is suing a union for mishandling or failing to handle a grievance. Duty of fair representation claims relating to the negotiation of collective bargaining agreements of work rules are not subject to the requirement of exhaustion of administrative remedies. *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1328 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981); *Beriault v. Local 40 International Longshoremen's Union*, 501 F.2d 258, 266 (9th Cir. 1974) (failure to seek arbitration before filing suit in district court held irrelevant because arbitrator cannot grant the modification of an agreement sought in this type of duty of fair representation action). It follows that the accrual date for statute of limitations purposes should not be postponed until the arbitrator renders a decision.

The district court was correct in a practical sense in that a determination by the arbitrator that the limit on severance pay had been removed would have made this duty of fair representation action unnecessary. However, this concern does not necessitate a rule postponing the accrual of duty of fair representation claims until the conclusion of related arbitration proceedings in all cases. If the district court finds that a pending arbitration decision may eliminate the need to litigate a duty of fair representation claim *in a particular case*, the district court can stay the court proceedings until the arbitrator renders a decision.

THE UNION'S MOTION FOR SUMMARY JUDGMENT

The district court granted the Union's motion for summary judgment on plaintiffs' duty of fair representation and promissory estoppel claims. We review the grant of summary judgment *de novo,* viewing the evidence in the light most favorable to the nonmoving party. *Taylor v. Sentry Life Insurance Co.,* 729 F.2d 652, 654 (9th Cir. 1984).

A. *Duty of Fair Representation*

A union's duty of fair representation extends to conduct during the negotiation or administration of a collective bargaining agreement. *Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14,* 453 F.2d 1018, 1023-24 (9th Cir. 1972). *See Bloom v. Teamsters Local 468,* 752 F.2d 1312, 1313-14 (9th Cir. 1984). Specifically, a duty of fair representation cause of action can be maintained when union representatives make misrepresentations to the union membership during the ratification process, *Anderson v. United Paperworkers International Union,* 641 F.2d 574, 576-78 (8th Cir. 1981); *Deboles v. Trans World Airlines,* 552 F.2d 1005, 1018 (3d Cir.), *cert. denied,* 434 U.S. 837 (1977), or in settling an unfair labor practice, *see Bloom,* 752 F.2d at 1313-14.

Although the duty of fair representation extends to misrepresentations during ratification, plaintiffs must establish a causal relationship between the alleged misrepresentations and their injury. *Brown v. UAW,* 689 F.2d 69, 71 (6th Cir. 1982); *Anderson,* 641 F.2d at 580; *Deboles,* 552 F.2d at 1018-19; *Barrett v. Thorofare Markets, Inc.,* 452 F. Supp. 880, 883-84 (W.D. Pa. 1978). *Cf.*

Bloom, 752 F.2d at 1313-14. In this context causation would be established by proof that (1) the vote to ratify would have been different had the misrepresentations not been made; and (2) that the company would have acceded to union demands had the vote been different. *See, e.g., Anderson*, 641 F.2d at 580; *Barrett*, 452 F. Supp. at 883.

At the hearing on the Union's motion for summary judgment in the district court, plaintiffs' counsel conceded that plaintiffs could not establish that American Can would have given in to their demand to remove the severance pay limit even if the strike had continued. Given this concession, we agree with the district court's grant of summary judgment against plaintiffs' duty of fair representation claim.

B. *Estoppel*

The district court found that estoppel was not available as a theory of recovery in a suit by union members against their union. Although we disagree with this proposition, we affirm the grant of summary judgment against plaintiffs' estoppel claim because plaintiffs' cannot establish that they relied to their detriment on the alleged misrepresentations.

The equitable doctrine of estoppel is an alternative theory of recovery in suits my members against their unions; it is not preempted by section 301. *Hass v. Darigold Dairy Products Co.*, 751 F.2d 1096, 1099-1100 (9th Cir. 1985). The elements of estoppel are determined by federal common law. *See Hass*, 751 F.2d at 1099-1100; *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1108 (9th Cir. 1976).

We have distinguished between equitable estoppel and promissory estoppel. *Hass,* 751 F.2d at 1099. Equitable estoppel is the more appropriate theory in this case because the plaintiffs allege reliance upon misrepresentations or concealments of present fact, i.e., the Union's representation that the severance fund cap had been lifted in the new agreement, rather than reliance upon a promise or future guarantee. *See id. See generally* J. Calamari & J. Perillo, *Contracts* § 11-34, at 445 (2d ed. 1977).

In order to state a cause of action based on equitable estoppel in this case, plaintiffs must establish that: (1) the Union was aware of the true facts; (2) the Union intended its representation to be acted on or acted such that the plaintiffs had a right to believe it so intended; (3) the plaintiffs were ignorant of the true facts; and (4) the plaintiffs relied on the Union's representation to their detriment. *See Bob's Big Boy Family Restaurants v. NLRB,* 625 F.2d 850, 854 (9th Cir. 1980); *see also Hass,* 751 F.2d at 1099-1100.

Even assuming the plaintiffs could establish the first three elements of equitable estoppel, plaintiffs cannot establish that their reliance on the alleged misrepresentations was to their detriment. The representations may have resulted in an earlier end to the strike than would have occurred otherwise. Plaintiffs concede, however, that they have no proof that American Can would have given

in on the severance pay issue in response to a longer strike.[2]

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[2] In addition, plaintiffs argue that because their inability to prove damages is a consequence of the Union's wrongful conduct, the Union is "estopped" from denying damages. As the Union's misrepresentation prevented an informed ratification vote and, possibly, prevented the strike from continuing, it is impossible to predict whether American Can would have lifted the severance cap. This uncertainty in causation is attributable to the Union's breach of its duty of fair representation. Accordingly, the plaintiffs argue, the risk of the uncertainty should be thrown upon the wrongdoer with damages awarded to the plaintiffs.

In support of this argument, plaintiffs cite several cases applying a more generous standard for proving the amount of damages where certainty has been prevented by the defendant's wrongful conduct. *See*, e.g., *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (antitrust case); *Frito-Lay Inc. v. Local Union No. 137, Int'l Bhd. of Teamsters*, 623 F.2d 1354, 1364 (9th Cir. 1980) (section 301 suit by employer against union for illegal strike), *cert. denied*, 449 U.S. 1013 (1980) and 449 U.S. 1112 (1981).

Plaintiffs misperceive the application of these holdings to this case. These decisions applied a liberal standard of proof in situations where the uncertainty concerned the *amount* or extent of damages, not where the very fact of damages was contested. Contrary to plaintiffs' assertions, there is no dispute concerning the amount of damages in this case. If the cap on the severance pay fund had been removed, each employee would have received his full severance pay. Rather the dispute concerns whether there have been any damages at all, as there has been no showing that American Can would have removed the cap had the Union misrepresentations not been made. We have found no authority which would allow a plaintiff to avoid his burden of proving a *causal* connection between the wrongful act and some amount of damages because the defendant's actions have made that proof difficult. *Cf. Mead v. Retail Clerks Int'l Ass'n, Local No. 839*, 523 F.2d 1371, 1376-77 (9th Cir. 1975) (section 303 unfair labor practice suit against union).

LEAVE TO AMEND

We review the district court's denial of leave to amend the complaint for an abuse of discretion. *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983). Although leave to amend is liberally granted under Fed. R. Civ. P. 15(a), undue delay, bad faith in seeking amendment, or undue prejudice to the party opposing amendment are grounds for denying leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *M/V American Queen*, 708 F.2d at 1492; *Roberts v. Arizona Board of Regents*, 661 F.2d 796, 798 (9th Cir. 1981). We have also noted that late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action. *M/V American Queen*, 708 F.2d at 1492; *Stein v. United Artists Corp.*, 691 F.2d 885, 898 (9th Cir. 1982).

Plaintiffs' attorney admitted that plaintiffs' delay in bringing the section 101 cause of action was a tactical choice because he felt that the causes of action already stated were sufficient. The district court found that plaintiffs' motion to amend was brought to avoid the possibility of an adverse summary judgment ruling, and that allowing amendment would prejudice the Union because of the necessity for further discovery. We conclude that the district court did not abuse its discretion in denying leave to amend in this case.

AFFIRMED.

ACRI v. INTERNATIONAL ASSOCIATION OF MACHINISTS, NO. 84-2467

REINHARDT, Circuit Judge, concurring:

I agree that the opinion Judge Hall has authored for the court correctly applies the law as it has evolved in judicial decisions. Accordingly, I join in that opinion. I write separately only to point out that the rule we follow has the practical effect, in almost every instance, of precluding union members from recovering against their unions in cases of this kind. We hold here, as courts have previously held, that a union member can establish liability only if he can show that had the strikes continued, the employer would have acceded to the union's requests. This is a fact that is ordinarily simply not susceptible of objective proof. In this case, counsel for plaintiffs frankly acknowledged he would be unable to offer such proof. In other cases it is possible that less forthright counsel may submit affidavits that will enable their clients to survive summary judgment. The end result in any such case, however, would in all likelihood be a wholly unwarranted trial followed by a verdict for the defendant.

The most persuasive evidence as to what the employer might have done had a union continued to engage in a strike would be the employer's own testimony. Thus, our test seemingly puts it within the power of employers who have survived a bitter strike to punish the unions that called it. However, I suspect that generally employers will, for a variety of reasons, be unwilling to testify that they were prepared to offer their employees a more favorable contract than the one they agreed to.

Determining what would have happened had a strike continued is far different from determining what would have occurred had a matter been submitted to arbitration, or even what the result of good faith bargaining might have been. The consequences of an arbitrary or discriminatory failure to submit a case to arbitration should be determined in a manner similar to that used in a malpractice case in which an attorney has failed to file a suit within the period prescribed by the statute of limitations: an objective evaluation is made as to the merits of the claim and its probable outcome. A make-whole remedy in a failure-to-bargain case is arrived at by determining what other comparable employers in the area have agreed to do following good-faith bargaining. (*See Martori Bros. Distributors v. James-Massengale*, No. 84-6137, slip op. (9th Cir. Jan. —, 1986), for description of the specific method used under California Agricultural Labor Relations Act.) However, it will almost always be far too speculative to attempt to show that an employer who has agreed to a particular collective bargaining agreement following a strike would have granted one or more specific additional benefits had the strike continued for a while longer. In short, the rule that union members must prove that a continuation of the strike would have resulted in an improved contract defies practicality and makes little sense in the every day world of labor relations.

I hasten to add that I think that a rule that makes breach of the duty of fair representation suits impractical in cases of the type before us achieves a desirable result. Were I free to decide what the law *should* be, I would simply not permit suits against union officials by union

members dissatisfied with their officers' conduct in negotiating collective bargaining agreements. Judge Hall's opinion, properly applying precedent, achieves that same result indirectly, by placing an impossible causation barrier in the way of such actions. In my view, the union's own election and removal process provides the proper vehicle for addressing complaints like the plaintiffs'. Negotiating labor contracts is difficult enough in these times without the additional threat of lawsuits from unhappy union members, with the attendant possibility of personal liability. Today's labor contracts no longer are automatic vehicles for gains by individual workers. Now, contracts containing cutbacks or reductions in benefits are far from infrequent. Dissatisfaction over the contents of a labor agreement is too easily transformed into a suit over the union official's performance.

It is true that the extreme case, a deliberate lie by a union officer regarding the contents of the agreement negotiated, is a sympathetic one for permitting litigation. However, there is a simple method of eliminating the possibility of any such occurrence. It is within the power of union members to require, in the union's by-laws or otherwise, that contracts be submitted to a vote only after the proposed changes have been reduced to writing and furnished to the membership. Such a rule would avoid the type of problem that allegedly arose here; it would not, however, result in any significant delay in the ratification process.

In any event, I agree that, under the current state of the law, Judge Hall's opinion, in which I fully join, states the applicable rule correctly.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-0340 EFL

GEORGE T. ACRI, et al.,

Plaintiffs,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.,

Defendants.

MEMORANDUM OPINION

(Filed November 23, 1983)

Plaintiffs, individual members of the International Association of Machinists and Aerospace Workers, originally filed this action on August 6, 1980, alleging breach of the duty of fair representation and breach of contract against the International and Local (collectively, "the Union") and American Can Company (the "Company"), their employer. The action was dismissed without prejudice as prematurely filed since resolution of the dispute through arbitration was pending; the stipulated dismissal provided that the statute of limitations was tolled as of August 6, 1980 to a date one year from the decision of the arbitrator, but not later than August 6, 1983. This action was refiled in this Court on January 14, 1982, within the time period stipulated to by the dismissal. The new complaint

alleged only breach of the duty of fair representation against the Union.[1]

Factual/Procedural Background

The 1974-1977 collective bargaining agreement between the Union and American Can Company contained the following provisions regarding severance pay:

> 7.0 If the Company (1) Closes the plant or a department or moves the plant or a department outside the present (meaning April 1, 1974) geographical jurisdiction of District #115 and (2) the closing or moving results in the termination of employees, the Company shall pay severance pay to terminated employees as follows:
>
> (a) Less than one (1) year of accredited service — no severance pay;
>
> (b) Over 1 year of accredited service — One (1) full week's pay (forty (40) hours straight time at the classification rate of pay) for every year of such service.
>
> . . . .

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[1] The Union argued during the arbitration proceedings that the Company had agreed that Section 8 did not represent a "cap" on the severance pay benefits available under Section 7. The arbitrator, however, in a decision rendered on October 14, 1981, held that the sections had to be read together and thus that Section 8 did provide a limit on the amounts which could be paid out under Section 7. Accordingly, the arbitrator divided the amount in the Section 8 fund pro rata among all those eligible for severance benefits under Section 7, resulting in awards of approximately 50% of what each employee would have received had there been no limit on severance pay other than as stated in Section 7.

Section 8 provides in part:

> 8. FINANCING
>
> Trust Fund
>
> 8.0 In accordance with the Plan, the Company will establish a trust fund. The Company will establish this Fund with a bank or banks or a trust company or companies selected by the Company as trustee.
>
> The Company's contributions will be made into the Fund, the assets of which will be held and invested and applied by the trustee in accordance with the Plan. Benefits will be payable only from such fund.

When the 1974-1977 contract expired, plaintiffs conducted a strike concerning terms of a new agreement. During the strike, negotiations for a new contract were held. Plaintiffs allege that Union representatives stated that the cap on severance pay arguably inherent in the Section 8 Trust Fund provisions quoted above had been removed, although at no time did the Company agree to such a change; that plaintiffs relied on the statements in agreeing to ratify the new contract and return to work from a strike which began May 1, 1977; that the Union continued falsely and deliberately to represent that such a change had been made in the severance pay provisions. When the plant closing was announced in February 1980, Union members were told that there were insufficient funds in the trust fund to pay severance pay at the full amount authorized by Section 7. Plaintiffs argue that they have been injured in relying on the misrepresentations to their detriment and that they are entitled to damages in the amount of the difference between what their severance pay would have been had the contract contained the terms stated in the Union's misrepresentation and what severance pay was actually paid by the Company.

Defendants filed a motion for summary judgment and to dismiss one plaintiff on September 9, 1983. Oral argument was heard on the motion on October 14, 1983. At that time, this Court granted the motion in part and took the remaining portions of the motion under submission. For the sake of clarity, this opinion will dispose of all parts of the motion.

The Statute of Limitations

Defendants argue that *DelCostello v. Teamsters,* 103 S.Ct. 2281 (1983) must be applied retroactively to bar plaintiffs' action. This decision has been applied retroactively in several other circuits. *See, e.g., Hand v. International Chemical Workers Union,* 712 F.2d 1350 (11th Cir. 1983); *Metz v. Tootsie Roll Industries, Inc.,* 715 F.2d 299 (7th Cir. 1983); and most recently and compellingly, *Perez v. Dana Corporation,* No. 82-1547 (3d Cir. September 28, 1983). The Ninth Circuit, however, has not ruled on this matter. Assuming, *arguendo,* that the six-month statute of limitations established by *DelCostello* for a § 301 action based on a breach of a duty of fair representation case should be applied retroactively, this Court must nonetheless decide when the statute of limitations began to run for each of the individual plaintiffs.

If this Court were to view this action simply as a common law fraud action, then California law would apply and the statute of limitations would run "only after one ha[d] knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry." *Hobart v. Hobart Estate Co.,* 26 Cal. 2d 412, 437, 159 P.2d 958 (1945). *See Garter-Bare Co. v. Munsingwear, Inc.,* 650 F.2d 975 (9th Cir. 1980).

However, this matter is a misrepresentation action in the labor relations context. The alleged misrepresentation is also a breach of the duty of fair representation. In the ordinary labor relations matter, "[t]he disposition of an employee's grievance becomes final at whatever stage of the grievance procedure the union and the employer resolve the grievance or terminate further consideration of it." *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983). The arbitrator in the instant case did not render a decision until October 14, 1981. Furthermore, the Company and the Union moved to dismiss this action when originally filed as premature[2] because the arbitration was pending. Thus, this Court holds that whatever statute applied must run from the date of the arbitrator's decision. This action was refiled within six months of the arbitra-

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[2] Defendants argue now that the previously-filed action was premature only with respect to the cause of action against the Company for breach of contract. In defendants' argument the arbitrator was not presented with the misrepresentation issue nor could he have ever decided it, since it concerned a relationship between the Union and its Union and the Company.
members and not a dispute between the employees or the

This argument is meritless. If the arbitrator had decided in favor of the Union, there would have been no misrepresentation and thus no suit against the Union for breach of the duty of fair representation. Hence, while the arbitrator may not have been squarely faced with the issue of the breach of the duty of fair representation, his decision held the alleged statement to be false.

Furthermore, it is settled law in this Circuit that the duty of fair representation includes matters involving the negotiation or administration of the collective bargaining agreement. *Retana v. Apartment, Motel, Hotel & El. Op. Union*, 453 F.2d 1018, 1024-25 (9th Cir. 1972), *accord, Anderson v. United Paperworkers International Union*, 641 F.2d 574, 577-78 (8th Cir. 1981).

tor's decision. Defendants have not argued in favor of a statute shorter than six months. Thus, defendants' motion for summary judgment on the ground of the statute of limitations is denied.[3]

Rulings on Summary Judgment
or Dismissal as Made at the Hearing

Without regard to the substantive issues supporting the remaining grounds for summary judgment, summary judgment is granted with respect to the following 12 plaintiffs for the reasons stated at the hearing on October 14, 1983. The Court notes both that plaintiffs' brief did not oppose granting of the motion with respect to these plaintiffs and that plaintiffs declined to argue against the motions at the hearing.

1. The eight plaintiffs who were not employed or members of the Union at the time the alleged misrepresentations were made: *i.e.,* BREGANTE, CHENG, GUAY, HUGHES, LEE, MADISON, MARJAI and SACKLEY.

2. The three plaintiffs who resigned prior to the plant closing: *i.e.,* HARRIS, MARKOVICH and WONG.

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[3] Defendants also imply that the original grievance was not timely filed. *See* Memorandum of Defendants in Support of Motion for an Order Granting Summary Judgment, filed September 9, 1983, p.9 n.6. The record reveals no timeliness objection made at the time the grievance was originally brought. In view of this Court's position that the arbitration did affect the basis for this litigation, defendants are now equitably estopped from asserting the timeliness of the grievance. *See Schultz v. Owens-Illinois, Inc.,* 696 F.2d 505, 512-13 (7th Cir. 1982).

3. The one plaintiff who refused to comply with discovery orders: *i.e.*, HALMOS.

Similarly, without regard to the remaining grounds for summary judgment, defendants' motion with respect to deceased plaintiffs FRYDMAN, KESSLER and STARK is denied on the ground of failure to comply with Fed. R. Civ. P. 25(a). Although dismissal appears to be mandatory under this Rule unless a motion to substitute a representative is made within 90 days of a suggestion of death on the record, the incidental mention of the deaths in answers to interrogatories does not appear to this Court to have started the 90-day period running. Federal Form 30 provides an example of the proper suggestion; the answers to interrogatories cited by defendants do not rise to the required level of formality. Furthermore, the suggestion was not served as required by the provisions of the Rule.

Proof of Misrepresentation and Proximate Cause

Defendants also move for summary judgment on the ground that plaintiffs cannot establish that defendants' alleged actions caused their injuries. Two major cases have been cited to this Court by both parties: *Anderson v. United Paperworkers International Union*, 641 F.2d 574 (8th Cir. 1981) and *Deboles v. TransWorld Airlines, Inc.*, 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977). In *Anderson*, a union representative told employee union members that their severance pay was guaranteed by a special security fund, knowing no such fund existed. The members testified at trial that they relied on the representative's statements in ratifying the contract and would

have gone on strike if they had known the truth. The Court of Appeals held that the district court erred in failing to grant judgment for defendants notwithstanding the jury verdict on the ground that "the evidence fails to demonstrate a causal link between Gear's misrepresentations and the plaintiffs' injuries." 641 F.2d at 578-79.

Similarly, in *Deboles,* following a court trial, the district court found liability for a union's misrepresentations regarding union efforts to secure seniority provisions without proof that the contract would not have been ratified had the members been told the whole truth. 552 F.2d at 1017. The Third Circuit reversed "because false statements may not create liability under the federal labor laws absent a showing of tangible injury proximately resulting from the falsehood." *Id.*

Defendants have urged that the instant case presents the same problem of lack of proof of a causal nexus between the alleged misrepresentation and plaintiffs' injuries. Plaintiffs' counsel conceded at oral argument that he could not prove that, absent the alleged misrepresentation, the Company would have acceded to union demands for removal of the severance pay cap. Thus, as even plaintiffs' counsel concedes, there would be now way to prove that plaintiffs would have received all the severance pay to which they were entitled under the eligibility provisions of Section 7. It is thus further conceded that unless plaintiffs have another theory under which they are entitled to recover, summary judgment must be entered against them.

Promissory Estoppel
as a Theory of Recovery

Although this action is framed in terms of breach of the duty of fair representation, plaintiffs urge this Court to grant relief based on a theory of promissory estoppel.[4] Plaintiffs argue that they ratified the new contract and returned to work in reliance upon the Union's "promise" that the full amount of severance pay without regard to the "cap" of Section 8 was guaranteed.

Plaintiffs urge a novel application of promissory estoppel upon this Court. Plaintiffs conceded and defendants represented at oral argument that such a theory has never been reported in the context of a duty of fair representation case. The theory essentially creates consideration where ther is none to permit enforcement of a (usually gratuitous) promise which reasonably can be expected to produce action or forbearance on the part of the promisee and which does so induce action or forbearance. Restatement (Second) of Contracts § 90 (1982). While the doctrine of promissory estoppel has been applied in a variety of contexts, both plaintiffs and defendants acknowledge that promissory estoppel has not been recog-

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[4] Plaintiffs' complaint does not include any cause of action based on promissory estoppel, although plaintiffs argued this issue orally. Plaintiffs also indicated at the hearing that they intended to move to amend their complaint to allege a cause of action based on promissory estoppel. Accordingly, for purposes of this motion, the Court will consider the present complaint as stating a cause of action for promissory estoppel. Plaintiffs' oral and written argument appears to confuse promissory estoppel as a theory of recovery and as a measure of damages. This Court need not reach the damage issue in view of its ruling granting summary judgment.

nized by any court in the context of a breach of the duty of fair representation. *See, e.g., Tomerlin v. Canadian Indemnity Co.*, 61 Cal. 2d 638, 39 Cal. Rptr. 731, 394 P.2d 571 (1964) (real estate sale); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958) (general contractor/subcontractor bidding); *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410, 258 P.2d 497 (1953) (mink coat pledge for loan).

This Court hesitates to extend the doctrine of promissory estoppel to the labor relations context. The policies underlying labor relations law strongly support deference to established precedent with respect to the adjudication of a breach of statutory duty such as the duty of fair representation. Furthermore, to permit the use of promissory estoppel in this labor relations context would permit plaintiffs to avoid the conceded difficulties of proof of proximate cause. Indeed, such proof is required by the labor relations misrepresentation cases such as *Anderson* and *Deboles*. As the Third Circuit has stated, "the federal courts have consistently required a direct nexus between breach of [the duty of fair representation] and resultant damages . . . ." *Deboles v. TransWorld Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir. 1977). In addition, to allow the use of promissory estoppel as a ground for recovery in this type of situation would encourage much litigation which is currently not authorized by statute, recognized by case law, or conceived of by legislative design.

Therefore, in view of the impossibility of plaintiffs being able to prove that the alleged misrepresentation

caused their injury, defendants' motion for summary judgment must be granted.

IT IS SO ORDERED.

DATED: November 23, 1983.

/s/ EUGENE F. LYNCH
United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-0340 EFL

GEORGE T. ACRI, et al.,

Plaintiffs,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.,

Defendants.

JUDGMENT

(Filed November —, 1983)

This Court having granted defendants' motion for summary judgment,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of defendants and against plaintiffs, each side to bear its own attorneys' fees and costs incurred herein.

DATED: November 23, 1983.

/s/ EUGENE F. LYNCH
United States District Court Judge

FILED
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No. 85-1829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GEORGE T. ACRI, *et al.*,
Petitioners,
v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; DISTRICT LODGE 115 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND LOCAL LODGE 68 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents International Association of Machinists and Aerospace Workers, District Lodge 115 of the International Association of Machinists and Aerospace Workers, and Local Lodge 68 of the International Association of Machinists and Aerospace Workers (hereinafter collectively referred to as the "Union" or "respondents") respectfully pray that this Court deny the Petition for a Writ of Certiorari filed on May 5, 1986, by petitioners.

COUNTERSTATEMENT OF THE CASE [1]

At all times relevant herein, petitioners were employed by American Can Company ("the Company") at its Brisbane, California plant and were represented for purposes of collective bargaining by the Union. The Company and Union were parties to a series of successive, three-year collective bargaining agreements, the last of which prior to the events in question in this case was signed in 1974. That agreement provided, *inter alia*, for a trust fund from which, in the event the Company closed the plant, terminated employees would receive severance pay at the rate of one week's pay for each year of an employee's service. The agreement further provided that severance pay "will be payable only from such fund," so that the funding limit for the trust placed a "cap" on the Company's liability for severance pay. Pet. App. 2, 16.

On May 1, 1977, upon the expiration of the 1974 collective bargaining agreement, the employees of the Company commenced a strike. That strike lasted until June 17, 1977, when a new agreement was ratified. It is undisputed that the new agreement made no changes in the severance pay provisions of the 1974 agreement. That was made clear to the employees in late 1977 when each em-

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[1] The opinions below, jurisdiction, and statutory provisions involved are set forth at p. 2 of the Petition. Two corrections are required in these preliminary matters. First, the opinion of the court of appeals is now officially reported at 781 F.2d 1393 (1986). Second, contrary to the assertion of petitioners, this case does not involve § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, but rather involves a cause of action implied from § 9 of that Act, 29 U.S.C. § 159(a), which provides in pertinent part as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

ployee, including each petitioner, received a copy of the 1977 collective bargaining agreement in the form of "paste-in" pages to be inserted by the employee in his copy of the prior agreement in those places where changes had been made. Pet. App. 2.

On February 1, 1980, the Company informed its employees that it would be closing the plant. Shortly thereafter, the employees were advised that there was insufficient money in the trust fund to pay severance pay at the contractually-specified rate. The Union filed a grievance seeking full severance pay for the terminated employees but that grievance was denied by an arbitrator who ordered the Company to pay approximately 50% of the severance pay that would have been due absent the funding limitation. Pet. App. 2-3, 17.

On August 6, 1980, petitioners commenced this action.[2] Petitioners' complaint alleged that at the ratification meeting that had been held three years earlier, in June, 1977, Union representatives had led the employees to believe that, in the event of a plant shut-down, severance pay would not be capped. The principal relief petitioners sought in their complaint was payment by the Union of the difference between the amount of severance pay petitioners received and the amount they would have received in the absence of the funding limitation. Pet. App. 3, 17.

Following the filing of the complaint, the parties engaged in extensive discovery. In the course of that discovery, petitioners took the depositions of Joseph Fischer, the Company official directly responsible for handling the 1977 negotiations, and John Buly, the Company's Director of Labor Relations who worked with Fischer in an advisory role during the 1977 negotiations. Fischer's testimony, corroborated by Buly, established

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[2] As petitioners correctly note, the action was dismissed without prejudice pending the arbitrator's decision, and was refiled on January 14, 1982, three months after the arbitrator rendered his award.

that "there was no way" the Company would have agreed to increased severance pay in 1977 as the Company was "hurting very badly economically" and was seeking "relief in a number of areas." Indeed, Fischer testified that he was under specific instructions not to agree to any provision that would "add to any potential closing costs," and that eliminating the funding limit on severance pay would have added approximately $1,000,000 in the event of a plant closing.

At the close of discovery, the Union moved for summary judgment. For purposes of its motion only, the Union assumed the truthfulness of petitioners' allegation that a misrepresentation had occurred at the ratification meeting in June, 1977. The Union contended, however, that it was nonetheless entitled to summary judgment for two independent reasons: first, petitioners' complaint was untimely under the six-month limitations period which this Court held applicable to fair representation claims in *DelCostello v. Teamsters*, 462 U.S. 151 (1983); and, second, the evidence—in particular the testimony of the Company officials whom petitioners had deposed—established that petitioners could not prove a causal connection between the alleged misrepresentation and the injury for which petitioners sought redress, *viz.*, the limitation on the severance pay petitioners had received.

In opposing summary judgment, petitioners argued that the applicable statute of limitations was a three-year California statute under which, according to petitioners, their complaint was timely. With respect to the causation issue, petitioners sought to minimize the significance of the Company's testimony by arguing that

> [w]hile it is true that the company officials have testified that they were prepared to hold firm on [the severance pay] issue, common sense and experience indicate that it is *impossible for anyone to determine* in retrospect how long the [petitioners] would have remained on strike or *how the employer*

> *would have responded to that strike had the [Union's] misrepresentations not been made.*[3]

In making this argument petitioners necessarily conceded that "they cannot prove that they would have received greater severance pay had the misrepresentations not occurred." [4]

The district court granted the Union's motion for summary judgment. That court ruled that while petitioners' complaint was timely, Pet. App. 18-19, petitioners conceded inability "to prove that the alleged misrepresentation caused their injury" was fatal to petitioners' claim, *id.* at 25.

On appeal, the Ninth Circuit affirmed. That court agreed with the district court that the complaint was timely, reasoning that this Court's *DelCostello* decision was not to be applied retroactively except where doing so would lengthen the otherwise applicable state limitations periods, and that therefore the statute of limitations to be applied to the case was a three-year California statute which petitioners easily satisfied. Pet. App. 4-6. But the court of appeals also agreed with the district court that petitioners "must establish a causal relationship between the alleged misrepresentations and their injury" and that because petitioners conceded that they could not do so,

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[3] Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment in No. C82 0340 EFL (N.D. Cal.) at pp. 12-13 (emphasis added).

[4] *Id.* at 15. *See also* Pet. App. 8, 22 (discussing concession at oral argument.)

After oral argument but before decision on the motion for summary judgment, petitioners sought to amend their complaint to add a new claim under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* Plaintiff's counsel conceded that he had not pled such a claim previously for tactical reasons. The district court denied leave to amend, concluding that the amendment after the close of discovery would prejudice the Union by requiring a new round of discovery. The court of appeals affirmed this ruling by the district court, Pet. App. 11, and petitioners do not seek review of that holding here.

summary judgment was properly entered for the Union. *Id.* at 7.

REASONS FOR DENYING THE WRIT

In their apparent zeal to persuade this Court to issue a writ of certiorari in this case, petitioners misstate the issue that was presented to and decided by the lower courts. As we show in Part I, those courts did *not* hold that a plaintiff can "recover no remedy" on account of union misrepresentations, Pet. at 6, nor did the courts below "immunize" such misrepresentations, *id.* at 9; *see id.* at 11, 12. Rather, the courts below merely held that a fair-representation plaintiff is required to prove that a violation caused an injury before damages may be recovered on account of that injury. This unremarkable holding: accords with this Court's decisions involving the duty of fair representation; is consistent with the decisions of the other courts of appeals in this area; and follows more general principles that this Court has developed with respect to the burden of proving the fact (as distinguished from the amount) of damages. There is, therefore, no reason for this Court to grant a writ of certiorari in this case.

In addition, as we show in Part II, even if the courts below had decided a question of law that merited this Court's attention, this case would not provide a suitable vehicle for bringing that question before the Court. The threshold question in this case is whether petitioner's complaint was filed in a timely manner. The resolution of that question requires decision as to whether *DelCostello* is entitled to retroactive effect in all cases or, as the court below held, only in those cases in which the alternative state statute of limitations is shorter than six months. This Court's certiorari decisions make clear that the Court has concluded that the retroactivity of *DelCostello* is not a question that warrants this Court's attention.

I.

A. In attempting to extract from the decision below some ruling of general significance, petitioners overlook

the fact that throughout the proceedings in the lower courts petitioners left no doubt that they were seeking redress from the Union for a specific and clearly defined injury: the receipt of less-than-full severance pay. The district court expressly stated that this was the injury petitioners were seeking to remedy. Pet. App. 17.[5] And the court of appeals thought it so clear that the remedy petitioners were seeking was the difference between capped and uncapped severance pay that the court concluded that "there is no dispute concerning the amount of damages in this case." Pet. App. 10 n.2.[6]

Because the lower courts so clearly understood petitioners to have limited the focus of their claim, the decision of those courts is, of necessity, equally limited. All that the court of appeals has held is that to recover damages on account of an injury, a fair representation claimant must prove a causal relationship between that injury and the union's asserted wrong. Applying that principle here, the appellate court concluded that because petitioners sought redress for the denial of uncapped severance pay, they were required to prove that but for the Union's (alleged) misrepresentations, petitioners would have obtained such severance pay. But the decision below would not necessarily require the same type of proof of causation in *other* cases in which *other* types of injuries were asserted. Indeed, the appellate court's decision says nothing about whether *these* peti-

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[5] "Plaintiffs argue that they have been injured in relying on the misrepresentations to their detriment and that they are entitled to damages in the amount of the difference between what their severance pay would have been had the contract contained the terms stated in the Union's misrepresentation and what severance pay was actually paid by the Company." [Pet. App. 17].

[6] Even in this Court, although petitioners assert an "intangible" injury and make reference to "nominal damages" or "general damages," Pet. 11-12, 14, petitioners ultimately concede that what they are seeking is an order requiring the union "to honor its [alleged] commitments by paying [petitioners] the difference between what it [allegedly] promised [uncapped severance pay] and what the employer really agreed to [capped severance pay]," *id.* at 13.

tioners would have been entitled to any other remedies (such as "nominal" or "general" damages, *see* Pet. 12, 14) had a request for such remedies been pressed below. Thus petitioners' repeated suggestion that the decision below precludes any remedy for union misrepresentation is simply wrong.

B. The principle that a fair-representation plaintiff must prove that the union's wrong caused the injury for which the plaintiff seeks recovery is firmly embedded in the decisions of this Court; indeed, even the cases relied on by petitioners articulate this rule.

The decision by this Court that is most closely analogous is *Humphrey v. Moore*, 375 U.S. 335 (1964). In that case the union, in the course of a grievance proceeding, agreed to dovetail the seniority lists of two employers which had merged. The principal holding of *Humphrey* is that the union did not violate its duty of fair representation in reaching that agreement as "the union took its position honestly, in good faith, and without hostility or arbitrary discrimination." *Id.* at 350. But there was a subsidiary issue in *Humphrey*—whether the employees who were disadvantaged by the dovetailing agreement were denied an adequate opportunity to defend their interests at the hearing at which the agreement was reached. *Id.* The Court disposed of that argument by noting that "[t]here was no substantial dispute about the facts concerning the nature of the transaction between the two companies" and that the plaintiffs

> have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented. The trial court found it 'idle speculation to assume that the result would have been different had the matter been differently presented.' We agree. [*Id.* at 350-51.]

Thus, plaintiffs' failure in *Humphrey* to prove that "the result would have been different"—which is to say to prove that the alleged wrong (denial of an opportunity to be heard) caused injury to the plaintiffs—was fatal to their claim.

This Court has applied a similar rule in the context of a claim by a discharged employee against his union for failing to press a grievance over the discharge. The Court has repeatedly held that in such cases, "[t]o prevail against . . . the union," the employee must not only "carry the burden of demonstrating breach of duty by the Union" but must also show "that the[] discharge was contrary to the contract." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976). *Accord, United Parcel Service v. Mitchell*, 451 U.S. 56, 62, 66-67 (1981); *Clayton v. Automobile Workers*, 451 U.S. 679, 683 n.4 (1981); *DelCostello v. Teamsters*, 462 U.S. 151, 164-65 (1983). This requirement reflects the Court's understanding that absent proof that the discharge was in breach of contract, the union's failure to press a grievance over the discharge cannot cause a cognizable injury to the employee.

A similar emphasis on causation is reflected in the Court's decision concerning the apportionment of liability between an employer and a union in circumstances in which a plaintiff proves both a wrongful discharge by the employer and a wrongful failure by the union to secure redress for the discharge. This Court first faced the apportionment issue in *Vaca v. Sipes*, 386 U.S. 171 (1967); the Court there concluded that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach," and the Court went on to hold that the determinative factor in establishing the extent of a union's liability is causation:

> The governing principle . . . is to apportion liability between the employer and the union *according to the damage caused by the fault of each.* Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but *increases in any if those damages causes by the union's refusal to process the grievance* should not be charged to the employer. [386 U.S. at 197-198; emphasis added]

Based on this principle the Court in *Vaca* held that the jury verdict holding the union liable for all losses incurred by the employee as the result of his discharge was improper. *See also Czosek v. O'Mara*, 397 U.S. 25, 29 (1970) ("judgment against [unions] can in any event be had only for those damages that flowed from their own conduct"; it is permissible to sue the union without suing the employer because "[i]f both the union and the employer have *independently caused damage to employees*, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages *caused by each*") (emphasis added).[7]

In its most recent apportionment case, *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), while the Court was divided in its assessment of the degree of damages attributable to the union, the Court was unanimous in reaffirming *Vaca's* "governing principle" that liability should be "apportion[ed] . . . between the employees and the unions according to the damages caused by the fault of each." 459 U.S. at 218, 223-24, n.13 (majority opinion); *id.* at 233-35 (White, J. dissenting). The majority in *Bowen* held the union liable for a portion of the employee's wage loss after the union breached its fair representation duty because in the majority's view "the union's breach of its duty of fair representation . . . caused the grievance procedure to malfunction resulting in an increase in the employee's damages," and

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[7] In *Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court, in holding that punitive damages may not be assessed in fair representation cases, relied on the "limitation on union liability" articulated in *Vaca* which limitation, the *Foust* Court explained

> reflects an attempt to afford individual employees redress for injuries *caused by union misconduct* without compromising the collective bargaining interests of union members in protecting limited funds. [*Id.* at 50; emphasis added.]

See also id. at 48-49 ("[t]he fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' right").

"[i]t would be . . . unjust to require the employer to bear the increase in the damages *caused by the union's wrongful conduct.*" *Id.* at 223 (emphasis added).

In sum, this Court's fair representation cases teach that union members may be awarded compensation only for injuries "*caused by violations* of employee rights," *Foust*, 442 U.S. at 48-49, and no more. That is precisely the principle the courts below applied, albeit in a somewhat different factual context than one this Court has confronted, in requiring petitioners here to prove, as a precondition to recovering the difference between capped and uncapped severance pay, that respondents caused petitioners to be denied uncapped pay.

C. Not surprisingly, given the authoritative teachings of this Court as discussed above, there is unanimity among the courts of appeals that causation must be proved to support recovery in fair representation cases. Two cases are especially significant, each of which is on all fours with the instant case, reaches the same result as the decisions below, and follows the very same reasoning as the courts below here adopted.

Anderson v. United Paperworkers, 641 F.2d 574 (8th Cir. 1981), is remarkably similar to the instant case in that it also involved an alleged misrepresentation by a union with respect to an employer's promise to pay severance pay. The Eighth Circuit held that in order to recover the unpaid severance benefits from the union, plaintiffs were required to establish that "but for [the] misrepresentations the severance pay would have been paid" by the employer. *Id.* at 580. *See also id.* at 579-580 & n.5. The *Anderson* Court, citing *Vaca v. Sipes*, *supra*, 386 U.S. at 197-98, stated that its conclusion was:

> consistent with the Supreme Court's mandate that a union be held accountable only for that portion of the employee's damages attributable to the union's breach of the duty of fair representation. [641 F.2d at 580.]

Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir. 1977), *cert. denied*, 434 U.S. 837, is in accord. There the Third Circuit held that despite proof that the union, in seeking contract ratification, falsely represented that it had sought but had been unable to secure from the employer certain contractual changes, there was no basis for union liability as "[t]here is no evidence that the voting outcome would have been different had the members been told the truth." *Id.* at 1013. The Court required plaintiffs to make a "demonstration of injury to the members proximately caused by the breach"; the court reasoned that "[i]n the absence of actual injury occasioned by the union's wrongful misstatements, imposing liability in the instant case would be punitive and discordant with the limited remedies available under the Act." *Id.* at 1019. *See also Brown v. UAW*, 689 F.2d 69, 71 (6th Cir. 1982) (union not liable for failing to monitor pension fund because company would not have complied with funding demands had they been made).

In short, there is no conflict among the circuits nor any confusion or uncertainty among the appellate courts on the issue presented here. Thus, nothing in the decisions of the lower courts warrants the issuance of a writ of certiorari in this case.

D. Finally, contrary to petitioners' suggestion, petitioners can derive no comfort from *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563 (1930), and its progeny. As the court of appeals here correctly recognized, "[t]hese decisions appl[y] a liberal standard of proof in situations where the uncertainty concern[s] the *amount* or extent of damages, not where the very fact of damages [is] contested." App. 10 n.4 (emphasis in original).

Story Parchment makes this plain; it draws "a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained such damage and the measure of proof necessary to enable the jury to fix the amount." *Id.* at 562. With respect to

the former, *Story Parchment* teaches that only " 'damages resulting necessarily and immediately from the breach are recoverable, *and not those that are contingent and uncertain.*' " *Id.* at 563 (emphasis added). In contrast, as to "damages which are definitely attributable to the wrong and only uncertain in respect of their amount," *Story Parchment* teaches that it is "enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference," as the "wrongdoer is not entitled to complaint that "damages] cannot be measured with . . . exactness and precision." *Id.* at 562-63. *See also Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 560-61 (1941) ("certainty of the fact of damage is essential"; once established "a reasonable basis of computation" suffices to fix the amount).

Here, of course, as the courts below recognized, the dispute concerns the *fact* of injury—whether the alleged misrepresentations by the Union caused the limitation on severance pay of which petitioners complain. The amount of damage attributable to this injury—assuming it was caused by the Union—is easily ascertained and is *not* in dispute. And as the court below stated, there is "no authority which would allow a plaintiff to avoid his burden of proving a causal connection between the wrongful act and some amount of damages. Pet. App. 10 n.4.

Thus, the decision below is fully consistent with this Court's decision, outside of the fair-representation area as well as with the decisions in that area.

II.

Even if, contrary to what we have just shown, the legal question decided below merited this Court's attention, this case nonetheless would not present an appropriate vehicle for addressing that question. For the court of appeals here considered the causation issue only after concluding that petitioners' fair-representation complaint

was filed within the three-year state statute of limitations which that court deemed applicable. Pet. App. 4-6. And if this Court were to grant certiorari here, the Court would confront a threshold claim of untimeliness which respondents would raise in support of the judgment below.

That this untimeliness claim is a substantial one cannot be denied. The court of appeals concluded that petitioners' cause of action "accru[ed] . . . sometime between February 1, 1980 and February 14, 1980 when plaintiffs were informed that the plant would be closed and that severance pay would be limited." Pet. App. 5. Petitioners' complaint was filed on August 6, 1980, more than six months after the earliest date on which, according to the appellate court, petitioners' cause of action may have accrued. That court sustained the timeliness of the complaint on the theory that *DelCostello v. Teamsters*, *supra*, is not entitled to retroactive effect except "when the state statute of limitations was shorter than the six-month period provided by *DelCostello*," Pet. App. 4, and thus that California law, which provides a "longer statute of limitations . . . determines the timeliness of plaintiffs' cause of action." Pet. App. 5.

Every other circuit to consider this issue has reached the opposite conclusion with respect to the retroactivity of DelCostello.[8] Those courts have concluded that in order to assure that the "purpose and effect" of *DelCostello* is not significantly " ' retard[ed],' " *Chevron Oil Co. v. Hut-*

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[8] *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko v. U.S. Air.*, 733 F.2d 239 (2nd Cir. 1984), *cert. denied*, —— U.S. ——; *Perez* v. *Dana Corp.*, 418 F.2d 581 (3d Cir. 1983); *Murray v. Branch Motor Employees*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 53 L.W. 3287; *Gray v. Meat Cutters*, 736 F.2d 1055 (5th Cir. 1984); *Smith v. General Motors*, 747 F.2d 372 (6th Cir. 1984) (en banc); *Landahl v. PPG Industries*, 746 F.2d 1312 (7th Cir. 1984); *Lincoln v. District 9*, 723 F.2d 627 (8th Cir. 1983); *Barnett v. United Air Lines*, 738 F.2d 358, 264 (10th Cir. 1984) (applied retroactively without discussion); *Rogers v. Lockheed Georgia*, 720 F.2d 1247 (11th Cir. 1983); *cert. denied*, —— U.S. ——, 53 L.W. 3287.

son, 404 U.S. 97, 107 (1971), the ruling in *DelCostello* is entitled to retroactive effect in *all* cases, regardless of whether the alternative state limitations period is longer or shorter than six-months. These decisions giving *DelCostello* full retroactive effect are more faithful to the rationale of *DelCostello* than the Ninth Circuit's partial retroactivity ruling, for *DelCostello* is premised on the federal policy favoring "the relatively rapid final resolution of labor disputes." 463 U.S. at 168, and *DelCostello* teaches that although limitations period of less than six months may not be "long enough," lengthy state limitations periods are "too long," *id.* at 166.

The question whether *DelCostello* is entitled to full retroactive effect—and thus whether petitioners' complaint in this case was timely filed—is the threshold question in this case. This Court has made clear, by its certiorari practice, that the Court does not view that question as worthy of the Court's attention,[9] no doubt because the controlling principles in deciding when to apply a new rule retroactively were settled in *Chevron*, and because the task of applying those principles to a particular new rule of law is appropriately left to the lower courts for the relatively brief period of time until the cases that

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[9] The Court has denied certiorari on the retroactivity of *DelCostello* at least eighteen times. *Teamsters v. Edwards*, 104 S.Ct. 1599 (1984); *Local 1020 v. McNoughton*, 105 S. Ct. 291 (1984); *Rogers v. Lockheed-Georgia*, 105 S.Ct. 292 (1984); *Murray v. Branch Welyczko v. U.S. Air*, 105 S.Ct. 512 (1984); *Bedat v. McLean Trucking Co.*, 105 S.Ct. 2325 (1985); *Glover v. United Grocers*, 105 S.Ct. 2357 (1985); *Rodman v. Hensley*, 105 S.Ct. 2020 (1985); *Freight Checkers v. Alderson*, 105 S.Ct. 3504 (1985); *Saville v. Westinghouse Elec. Corp.*, 106 S.Ct. 280 (1985); *Greyhound Lines v. Wilhite*, 106 S.Ct. 280 (1985); *Aragon v. Teamsters Local 572*, 106 S.Ct. 229 (1985); *Scaglione v. Communications Workers Local 1395*, 106 S.Ct. 251 (1985); *Taylor v. United Auto Workers Local 980*, 106 S.Ct. 849 (1986); *Mauget v. Kaiser Engineers, Inc.*, 106 S.Ct. 496 (1986); *Salisbury v. James River Corp.*, 106 S.Ct. 807 (1986); *Davis v. United Auto Workers Local 970*, 106 S.Ct. 1284 (1986).

predate the announcement of the new rule are adjudicated. Accordingly, the posture of this case provides an independent reason for denying certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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